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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

FRED HUANTE et al.,

Defendants and Appellants.

C080122, C080600

(Super. Ct. No. 11F02676)

Defendant Fred Huante appeals from both a resentencing order following remand from this court, and an order denying a postjudgment discovery motion. Defendant Vincent Rivera appeals only from the trial court's order denying that same postjudgment discovery motion. Defendants both argue the trial court erred in finding it lacked jurisdiction to hear their postjudgment discovery motion. We conclude the trial court did not have jurisdiction to hear defendant's postjudgment discovery motion because no cause was pending in the trial court at the time of the motion. Accordingly we affirm that order.

Defendant Huante further contends the amended abstract of judgment issued by the trial court after resentencing is replete with clerical errors. The People agree. We accept the People's concession and will order the amended abstract of judgment corrected.

## FACTS AND PROCEEDINGS

A jury found both defendants guilty of first degree murder and, among other things, the attempted murders of three other men. (*People v. Rivera* (2015) 234 Cal.App.4th 1350, 1352 (*Rivera*).) Defendants appealed their conviction. (*Id.* at p. 1350.) While that appeal was pending, appellate counsel for defendants filed an application in this court seeking to expand the appointment of counsel.

On February 6, 2015, we granted that application in part, as follows: "Counsel is granted funding for up to ten (10) hours for the purpose of filing and litigating in the superior court a motion to release ballistics evidence along with a request for the release of related expert fees for forensic testing. . . . The superior court may determine whether appellants have made a sufficient prima facie showing of ineffective trial counsel to authorize funds for the forensic testing, which has been sought in anticipation of filing a petition for writ of habeas corpus in that court." We further directed that a copy of the order be delivered to the trial court.

On March 9, 2015, this court published an opinion reversing defendant Huante's first degree murder conviction and remanding the case to the trial court. (*Rivera, supra*, 234 Cal.App.4th at p. 1359.) We directed the People to either accept a reduction in Huante's conviction to second degree murder or retry the first degree murder charge to a properly instructed jury. (*Ibid.*)

On remand, the People accepted the reduction to second degree murder and on August 12, 2015, the trial court sentenced Huante to a term of 15 years to life on that conviction, a reduction of 10 years from his original sentence. Thus, along with the

sentence imposed on the remaining counts, the trial court sentenced Huante to an aggregate determinate term of 20 years, consecutive to an indeterminate term of 61 years to life, in state prison. On August 17, 2015, Huante filed a notice of appeal.

Three days later, on August 20, 2015, defendants jointly filed a motion in the trial court seeking the release of bullets admitted into evidence at trial. Defendants wanted to have those bullets independently tested in anticipation of a petition for habeas corpus. Defendants also sought funds from the trial court in order to retain an expert to test those bullets. The trial court denied defendants' motion in a written order dated September 8, 2015. Citing this court's decision in *People v. Ainsworth* (1990) 217 Cal.App.3d 247 (*Ainsworth*), the trial court ruled that it lacked jurisdiction to hear defendants' motion because the case was final and there was "no proceeding pending before the court." The trial court further found that Penal Code section 1054.9 (unless otherwise stated, statutory references that follow are to the Penal Code) did not apply to either defendant because neither was sentenced to death or life in prison without the possibility of parole and there was no "common law right to examine exhibits" as defendants had argued.

The trial court also ruled that because no petition for a writ of habeas corpus had been filed and no order to show cause was issued, the court lacked authority to authorize additional money for retention of an expert to examine the bullets.

Finally, the trial court noted that "[n]othing in this order precludes the parties from agreeing to release and testing of the exhibits pursuant to the standard statutory procedure of section 1417 et seq. Nor does the court express any opinion upon the merits of any petition for writ of habeas corpus defendants may decide to file, or the need for discovery, including experts, in pursuing any such petition."

Defendants both appeal from this order.

## DISCUSSION

### I

#### *Defendants' Postjudgment Discovery Motion*

Defendants contend the trial court erred in finding it lacked jurisdiction to consider the motion to release evidence for additional forensic testing and to authorize fees for an expert to conduct the testing. The People disagree. We conclude the trial court lacked jurisdiction to consider defendants' motion because at the time the motion was filed, no proceeding was pending in the trial court. (See *In re Scott* (2003) 29 Cal.4th 783, 814 [discovery is available in a habeas corpus proceeding once an order to show cause has issued]; see also *Ainsworth, supra*, 217 Cal.App.3d at p. 251 [trial court lacks jurisdiction to entertain a postjudgment discovery motion that is unrelated to any proceeding then pending before the court].)

As a general rule, “[t]here is no decisional or statutory authority for a trial court to entertain a postjudgment discovery motion which is unrelated to any proceeding then pending before the court.” (*Ainsworth, supra*, 217 Cal.App.3d at p. 251; see also *People v. Davis* (2015) 226 Cal.App.4th 1353, 1365.) Section 1054.9 modifies the rule and authorizes defendants sentenced to death or life without the possibility of parole pre-habeas corpus motion for discovery of peace officer personnel records. (§ 1054.9; *In re Steele* (2004) 32 Cal.4th 682; *Davis*, at p. 1366.) Because neither defendant here was sentenced to death or life without the possibility of parole, neither can rely on section 1054.9.

Nor can defendants rely on section 1054.9 because they are sentenced to “de facto [life] sentences.” Defendant Rivera suggests that, given the length of their sentences, if section 1054.9 does not apply to them the statute would not survive an equal protection challenge. Defendant Rivera does not, however, make any actual argument for that suggestion nor does he cite any relevant legal authority. Accordingly, this claim fails.

(See *People v. Hardy* (1992) 2 Cal.4th 86, 150 [a reviewing court need not address any issue purportedly raised without argument or citation to relevant authority].)

Defendants' postjudgment discovery motion was filed on August 20, 2015, three days after defendant Huante filed his notice of appeal from the resentencing order and more than five months after defendant Rivera's conviction was affirmed on appeal. (*Rivera, supra*, 234 Cal.App.4th 1350.) Thus, while defendant Rivera's case was final and Huante's case was on appeal, execution of sentence for both defendants had begun and the trial court did not have jurisdiction to hear a postjudgment discovery motion filed in anticipation of a habeas corpus writ. (See *People v. Scarbrough* (2015) 240 Cal.App.4th 916, 923-924 [with limited exceptions trial court is divested of jurisdiction once execution of sentence begins]; see also *Ainsworth, supra*, 217 Cal.App.3d at pp. 251-252 [trial court lacks authority to hear a postjudgment discovery motion, filed in anticipation of a collateral attack on the judgment].)

Defendants contend the order expanding the appointment of counsel, issued by this court on February 16, 2015, gave the trial court jurisdiction to consider their postjudgment discovery motion. At the time we issued that order, defendants' prior appeal was still pending in this court and no petition for a habeas corpus writ had yet been filed in the trial court. Accordingly, the trial court lacked jurisdiction to hear defendants' motion. (*Ainsworth, supra*, 217 Cal.App.3d at p. 251; see also *People v. Davis, supra*, 226 Cal.App.4th at p. 1365.) We cannot confer jurisdiction on the trial court. Thus, our order was in error.

In sum, we affirm the trial court's order. This decision does not preclude defendants from filing habeas petitions in the trial court in order to obtain the bullets and an expert, or from working with the People to obtain the bullets under sections 1417 et seq. as suggested by the trial court.

## II

### *Clerical Errors*

Defendant Huante further contends the amended abstract of judgment should be amended again in order to correctly reflect the judgment of the court. The People agree the abstract should be amended. Having reviewed the record, we accept the People's concession.

"Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls." (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385, citing *People v. Mitchell* (2001) 26 Cal.4th 181, 185-186; *People v. Mesa* (1975) 14 Cal.3d 466, 471.)

At resentencing, the trial court sentenced defendant Huante to a term of seven years to life on count 2. The amended abstract of judgment, however, indicates the sentence on count 2 is 15 years to life.

The amended abstract of judgment also omits the conviction on count 4. The conviction on count 4 should be included and should reflect that the sentence on count 4 was stayed pursuant to section 654.

The amended abstract of judgment also omits the enhancement appended to count 6, ordered by the trial court.

Finally, in section "6.d" of the amended abstract of judgment it reads, "25 years to Life on counts \_\_\_\_." It is not apparent to which count that 25 years to life is attached, if any; it should be corrected or clarified.

## DISPOSITION

The September 8, 2015, order denying defendants' postjudgment discovery motion is affirmed. The trial court is directed to correct the August 12, 2015, amended abstract of judgment as discussed in this opinion and deliver a certified copy of the corrected amended abstract to the Department of Corrections and Rehabilitation.

\_\_\_\_\_ HULL \_\_\_\_\_, Acting P. J.

We concur:

\_\_\_\_\_ ROBIE \_\_\_\_\_, J.

\_\_\_\_\_ HOCH \_\_\_\_\_, J.